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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	

PETITION FOR RECONSIDERATION OF THE REAL ACCESS ALLIANCE

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SUMMARY

The Real Access Alliance hereby requests that the Commission reconsider the Reports and Orders and Memorandum Opinions and Orders in the captioned proceeding, FCC 00-366, released October 25, 2000 (the "Orders"). The Orders reach mistaken conclusions regarding the role of building owners in the development of facilities-based competition; exceed the scope of the Commission's authority by expanding the Over-the-Air-Reception Devices ("OTARD") rule to include antennas used to receive and transmit data and voice communications; and further exceed the Commission's authority by interpreting Section 224 of the Communications Act to apply to facilities and access rights inside buildings.

The record below shows that the forced access solutions promoted by the competitive local exchange carriers ("CLECs") are unnecessary and unlawful. The Alliance recognizes that the Commission has been charged with promoting competition and may have felt compelled to act in some fashion. Indeed, the Orders are relatively restrained, in light of the broad scope of the proceeding and the claims of the proponents of regulation. Nevertheless, Commission regulation of building access merely perpetuates the outmoded attitudes and approaches of the past. In an era of multiple providers, competition, and deregulation, providers should understand that they cannot turn to the Commission to solve all their business problems. Similarly, the Commission must avoid the temptation to dispense regulatory favors to preferred industry sectors.

The Orders acknowledge that the record contains no statistical evidence to support the claim that building owners are unreasonably restricting access to their buildings. Rather than cite the abundant statistical evidence introduced by the Alliance showing that indeed the opposite is true, the Commission still chooses to rely on unverifiable anonymous anecdotes to support its

preferred policy conclusions. This is not only incorrect, but legally improper, and renders any subsequent ruling based on that flawed premise invalid. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). The Commission should therefore revise its conclusions regarding the market power of building owners and their behavior with respect to competitive providers, and replace them with conclusions based on the full record.

The Orders also unlawfully extend the OTARD rules. The Commission had no power to extend the original OTARD rule to leased property. As the Alliance has argued in *Building Owners and Managers Association et al. v. FCC*, No. 99-1009, which is pending before the U.S. Court of Appeals for the D.C. Circuit, the Commission had no authority to require building owners to allow tenants to install antennas. Consequently, the amendment promulgated in the Orders is also invalid, to the extent that it applies to leased property. Furthermore, because Section 207 of the Telecommunications Act of 1996 did not confer new authority on the Commission, the Commission is forced to rely on its ancillary authority to justify the latest amendment. But because that ancillary authority only extends to matters "already within the boundaries" of the Commission's powers, it does not apply in this case. Building owners fall outside the Commission's jurisdiction. Indeed, the Commission concedes as much in the Further Notice of Proposed Rulemaking released with the Orders, which seeks to achieve the CLECs' goals by regulating carriers rather than property owners.

Finally, the Orders improperly extend the reach of Section 224 to facilities and access rights inside buildings. This was never the purpose behind Section 224, as demonstrated by the legislative history of the Pole Attachment Act. Section 224 was only intended to allow cable companies – and later telecommunications companies – the benefit of exterior transmission facilities operated by incumbent utilities. The name "Pole Attachment Act" says it all.

Furthermore, the Orders fail to recognize that the term "right-of-way" is a term of art in real property law, and the Commission is not free to redefine it. A right-of-way is either the right to pass unimpeded over the land of another, or the underlying strip of land. Because a building owner always has discretion to control entry to a building or otherwise limit activities within a building, there can be no rights-of-way inside buildings. This may explain why the Orders cited no legal precedent to support the Commission's position.

In sum, the Commission's Orders reach incorrect conclusions and are vulnerable to legal challenge. The Alliance respectfully requests that they be reconsidered.

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PETITION FOR RECONSIDERATION OF THE REAL ACCESS ALLIANCE

INTRODUCTION

The Real Access Alliance[1] hereby asks that the Commission reconsider the Reports and Orders and Memorandum Opinions and Orders in the captioned proceeding, FCC 00-366,

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[1] The members of the Real Access Alliance are: the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and the Real Estate Roundtable.

released October 25, 2000 ("Orders").[2] The competitive carrier proponents of these rulemakings have persuaded the Commission to solve by fiat problems which, if they exist at all, are being resolved voluntarily by the interested parties. Compulsory action is not supported in fact nor achievable by law. The proceedings should be terminated before further and irreparable harm is done to property interests long safeguarded in this country.[3]

To be sure, the FCC exercised commendable caution in limiting the prohibition on exclusive dealing to telecommunications carriers serving commercial multiple tenant environments ("MTEs"). In applying Section 224 of the Communications Act, 47 U.S.C. §224, to MTEs, the Commission similarly chose to act upon telecommunications carriers and other utilities rather than directly against MTE owners or operators. The decision in Docket 88-57 acknowledges the MTE owner's authority over internal wiring by mandating the relocation of carrier demarcation points to a Minimum Point of Entry ("MPOE") if requested by the owner.

Nonetheless, the Orders sweep far beyond the FCC's authority in applying Section 207 of the Telecommunications Act of 1996, implemented at Section 1.4000 of the Commission's rules, 47 C.F.R. §1.4000, to small antennas on tenant premises used not only to receive video programming but also to receive and transmit fixed wireless signals delivering data and voice via

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[2] 66 Fed. Reg. 2232, January 11, 2001. The Orders consisted of a First Report and Order in WT Docket No. 99-217, a Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98 and a Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57. These documents were combined with a Further Notice of Proposed Rulemaking in WT 99-217, upon which the Real Access Alliance is commenting separately.

[3] The Real Access Alliance filed separately, on January 8, 2001, a Motion for Stay of certain of the Orders in these proceedings.

satellite or terrestrial networks. Unlawfully, the Commission has directly restrained owners from interfering with tenant placement of these small antennas.[4]

The Commission also overstepped when it interpreted Section 224 to apply to MTE interior spaces through the statute's use of the phrase "conduit or right-of-way owned or controlled by a utility." That Section 224 applies to utilities and not MTE owners cannot save the illegal consequences of the mandate. For owners have been deprived of a time-honored and essential property interest: the right to exclude interlopers.

In the end, the Commission's relatively restrained decisions suffer from the same drawback as the excessive actions: They spring from a misreading of the record and a faulty analysis of the competitive marketplace. These faults lead to a misapplication of the law which cannot be corrected in the frame of the original Notice of Proposed Rulemaking. Accordingly, the proceedings should be terminated.

I. BUILDING OWNERS DO NOT EXERT MARKET POWER OVER MTE ACCESS.

A. The facts do not support the actions taken.

Despite finding that "the record does not contain statistical evidence regarding the prevalence" of "unreasonably restrictive behavior on the part of incumbent LECs and building owners" against competitive carriers ("CLECs") seeking access to MTEs, the Commission places unwarranted trust in compilations of anonymous anecdotes which permit no meaningful rejoinder. (Orders, ¶¶ 17-19, notes 47-55) Because the actors in these stories are not identified and only their one-sided grievances are related, it is impossible to know how many complaints

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[4] Certain members of the Real Access Alliance have challenged the original, video-only version of Section 1.4000, sometimes known as the "Over-the-Air Reception Device" ("OTARD") rule, in Building Owners and Managers International, et al. v. FCC, No. 99-1009, U.S. Court of Appeals for the D.C. Circuit.

are duplicates and whether any might be justified. One of the FCC's favorite sources of anonymous accusations, the ALTS Comments of August 27, 1999, introduces (11-12), then embellishes (15), the repeated story of a Florida property owner whose asserted avarice threatens to cost a CLEC $300,000 a year to serve a single MTE.[5] The same anecdote has been recited by both Winstar and Teligent in other FCC and Florida proceedings.[6]

In fact, there is statistical record evidence by which to approximate the prevalence of this alleged misbehavior, but the Commission chose to ignore it. Exhibit C to the Comments of the Real Access Alliance, August 27, 1999, summarized a survey conducted for the Alliance by the Charlton Company. Key objectives of the survey included evaluation of levels of access granted by real estate owners and managers to competitive telecommunications service providers, time consumed in negotiating leases and motivations of owners and managers in offering telecommunications services to clients. Among the statistical results:

1. Percentage of competitive carrier solicitations resulting in leases. Each carrier requesting access and each owner/lessor is listed by name.

2. Where access was denied, a breakdown of reasons.

3. In the reverse of 2, a breakdown of carrier denials of service requested by owners.

4. Percentage of carrier requests for exclusive contracts.

5. Lengths of negotiation periods by type of lease.

6. Owner motivations for offering telecommunications services, supplemented by statistical breakouts of owner-perceived "costs and inconveniences" of installing new wired and wireless technologies.

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[5] The assumption appears to be that the CLEC would be chosen by every tenant -- hardly likely and certainly not necessary to achieve workable competition. We discuss further below the unspoken premise that each building is a separate market.

[6] Notice of Proposed Rulemaking, WT 99-217, 14 FCC Rcd 12673, 12689, note 63. ("Notice")

The results of the Charlton survey were discussed at length in the Comments and Reply Comments of the Real Access Alliance, and need not be repeated here. A summary suffices: The survey results "show that building owners are treating competitive providers fairly and reasonably. Owners rarely turn providers away, and when they do it is for sound business reasons." (Comments, August 27, 1999, 10)[7]

Exhibit D to the Real Access Alliance opening comments was an economic analysis performed by Strategic Policy Research of Bethesda, Maryland. ("SPR") Among other statistical evidence, the SPR analysis estimated the total number of privately owned MTEs in the United States (about one million) and their combined square footage (12.3 billion). SPR reported that in "downtown Manhattan alone, there are 1,397 buildings accounting for 388 million square feet." (Analysis at 3) The largest building owner/management firm in the country, Jones Lang Lasalle, controls less than six per cent of commercial office space. SPR noted that this is one of several indices making the building leasing industry unconcentrated and competitively structured. The Federal Trade Commission recognized this in 1996 when it exempted business and residential rental property , among other real estate categories, from "pre-merger notification" under a preventive anti-trust statute, the Hart-Scott-Rodino Act. 15 U.S.C. §18a.

These contra-indications of power for owners and managers in the national market for telecommunications access to MTEs were reinforced by the Real Access Alliance's close examination of the ALTS anecdotes referenced earlier. Again, that discussion (Reply

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[7] *See also*, ex parte communication of Real Access Alliance, June 16, 2000, discussing, among other points, the survey entitled "Critical Connections" and submitting an executive summary.

Comments, 4-9) need not be repeated here. However, taking a liberal view of the volume of the complaints, and accepting their one-sided allegations as true for purposes of argument, the Real Access Alliance concluded that "ALTS is demanding regulatory action for a problem that affects, at most, only *one percent of all office buildings." Id.* at 5, emphasis in original.[8]

This simply cannot serve as any reasonable index of market power exerted by building owners and managers.[9] Nor can the FCC's finding of market power be sustained within the frame of "local telecommunications markets" captioning this proceeding. The eight ALTS anecdotes identified as arising in New York City, even if multiplied to account for possible under-reporting, reflect a tiny percentage of the nearly 1400 MTEs SPR estimates for "downtown Manhattan." While the record does not contain data for the numbers of MTEs in other local markets, the Real Access Alliance is confident that the percentages in the cities cited by ALTS – Baltimore-Washington, Chicago, Detroit, Houston and others – would also be quite small.

Plainly, MTE owners and managers do not come close to holding market power in national, regional or local markets for telecommunications access to MTEs. What market, then, does the FCC have in mind when it declares: "[T]he evidence supports the conclusion that, at

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[8] The Alliance used the ALTS estimate of 750,000 commercial office buildings rather than the 1 million commercial and residential MTEs estimated by SPR. The FCC's own count, 1.75 million (Orders, ¶23), if used as a denominator, would reduce the percentage of "problem" MTEs to less than one-half of one percent.

[9] We do not mean to imply that low market share alone is determinative of negligible market power. But even when elasticities of supply and demand are taken into account, the unconcentrated state of the business and residential rental market identified by the Federal Trade Commission suggests that for every lessor whose refusals to deal are meant to extract supra-competitive profits, there will be numerous other lessors ready to offer competitive terms. *See generally*, Areeda, Hovenkamp and Solow, IIA *Antitrust Law* (Aspen Law & Business, 1995), 90.

least in some instances, building owners exercise market power over telecommunications access." (Orders, ¶23) Only one "instance" is specified: "There is no question that building owners control access to any individual building." (Orders, ¶21)

The balance of the discussion is hypothetical and speculative. Whether control of single buildings translates into unreasonable restrictions on access, we are told, "depends on the circumstances in particular real estate markets." The buildout of CLECs in "only a small percentage" of MTE locations is viewed with alarm, despite concrete record evidence that lack of capital and other neutral factors far outweigh the likelihood of unreasonable discrimination by owners and managers. (Orders, ¶¶ 21, 23)[10]

By appearing to treat single MTEs as markets of their own, the FCC comes perilously close to finding MTEs to be "essential facilities" as the concept is applied in antitrust law.[11] The difficulties with this implicit analysis – unfortunately, the Commission never straightforwardly explains its approach – have been discussed by the Real Access Alliance at Exhibit D to its Comments (the SPR report) and at pages 17-23 of its Reply Comments. In short, building owners and managers are not monopolists, but even if they could be so classified, they are not attempting, by any evidence on this record, to extend their power into other markets.

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[10] Nor are even these constraints prohibiting competitive carrier growth. The FCC reported recently that total CLEC lines had increased 53% in the first six months of the year 2000. (News release, December 4, 2000)

[11] One of the difficulties in responding to the Orders through conventional competitive analysis is that the FCC never explicitly constructs a geographic market and never expressly asserts an antitrust theory on which it relies. But "market power" is a term of art which ought not be employed so loosely.

B. The Commission's analysis lacks a legal framework.

As noted by the Real Access Alliance, the Commission has no general authority, in any event, to enforce the antitrust laws as such.[12] This does not excuse the agency, however, from careful application of the tools of competitive analysis. Even when the stake is something short of denying merger or ordering divestiture, economic regulation has important consequences and must be taken seriously.

Certainly the Commission has recognized this in the on-going rulemaking proceeding titled "Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area," CC Docket No. 96-149. While the proceeding is chiefly concerned with long-distance telephony, the record contains instructive parallels to the effort to create similar competitive conditions in the market for local telephone and data services, including the services to MTEs at issue here.

In the Second Report and Order in Docket 96-149, the FCC began with a process of market definition:

> In order to determine that a particular carrier or group of carriers possesses market power, it is first necessary to define the relevant product and geographic markets.[13]

The discussion relied on the 1992 Merger Guidelines of the Department of Justice for a definition of market power as "the ability profitably to maintain prices above competitive levels for a significant period of time." *Id.* at note 41.

A liberal reading of the Orders here would allow us to infer that the product market consists of rental space to support services that can be delivered to MTEs by incumbent or

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[12] Reply Comments, 23, citing *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959). 667

[13] 12 FCC Rcd 15756, at ¶16 (1997).

competitive local exchange carriers. The geographic market, however, remains undefined. As discussed above, the FCC appears to treat each MTE as a market of its own. But this is not only impracticable for reasons of limited space and the other economic constraints previously adduced by the Real Access Alliance. (Comments, 25-26 and 60-71).[14] It is also contrary to the Commission's prior reasoning in the Docket 96-149 order:

> In many point-to-point markets (e.g. one home to another home), one long distance carrier will have 100 percent market share. This does not imply, however, that this particular long distance carrier has market power.[15]

Analogously, a building owner's control of a single building, if it exists, does not translate to market power in any local, regional or national market.

Beyond the failure to define a geographic market, the Orders here pay little mind to the Justice Department's definition of market power, adopted by the FCC in previous rulemakings. A claim of building owners' "ability and incentive to extract excessive profits from the provision of telecommunications services" is supported only by Teligent and Winstar references to unspecified costs of relocation which "lock in" commercial tenants to particular buildings. (Orders, ¶23, n.59) How this lock-in effect, if it exists, translates to the Justice Department's "prices above competitive levels for significant periods of time" is simply never explained.[16]

It is not acceptable, in our view, to determine market power without defining the market or illustrating, in some specific way, the actuality of telecommunications access prices pegged above competitive levels for significant periods of time. This would be a classic error of failing

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[14] *See also*, Reply Comments of Apex Site Management, September 27, 1999, 5-6.

[15] 12 FCC Rcd 15756, at n. 181.

[16] A related issue is raised by the Orders' view that tenants' "effective choice in the near term" depends on "typical length of leases." (¶21) The Commission's choice of five to 15 years as a typical range for commercial leases appears to reference Real Access Alliance's Comments. (¶162) To the contrary, we reported the usual range as three to five years. (Comments, 7)

to relate the conclusions reached to the facts found.[17] Even if the Commission were to disavow its prior approaches to competitive analysis, it would be obliged to explain the departure.[18] For these reasons, the Commission should reconsider and revise its conclusion that building owners possess market power.

II. THE ORDERS UNLAWFULLY EXTEND THE INVALID OTARD RULE.

BOMA and other members of the Real Access Alliance have sought judicial review (note 4, *supra*) of the OTARD Second Report and Order which first infringed MTE owners' property and contractual rights by authorizing tenants, without permission, to install certain types of antennas for over-the-air reception of video signals.[19] The Orders here, which extend the authorization of video signal reception to include certain antennas for the reception and transmission of fixed wireless signals, are unlawful for all the reasons discussed in the BOMA challengers' opening brief.[20] The argument is summarized below, and the entire brief is incorporated by reference.

1. The *Second OTARD Order* must be vacated because the order violates the Takings Clause of the Fifth Amendment to the United States Constitution.

2. The Court need not address the constitutional issue, however, for three reasons:

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[17] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("[O]ur review must be 'searching and careful' and we must ensure both that the Commission has adequately considered all relevant factors and that it has demonstrated a 'rational connection between the facts found and the choice made'.")

[18] *Office of Communication of United Church of Christ v. F.C.C.*, 560 F.2d 529, 532 (1977) ("[C]hanges in policy must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored, and . . . that [the agency] is faithful and not indifferent to rule of law'." [Internal citation omitted]. *See also, AT&T Corp. v. FCC*, No. 99-1535, decided January 23, 2001, Section III.B ("The FCC departed from its traditional non-dominance analysis without explanation.")

[19] 13 FCC Rcd 23874 (1998), reconsideration denied, 14 FCC Rcd 19924 (1999).

[20] Brief for Petitioners, October 16, 2000.

(a) the Commission had no statutory authority to extend the OTARD rule to leased property;

(b) the Commission has no inherent takings power, and Section 207 does not expressly direct the Commission to take the property of building owners, so the Commission was obligated not to raise the takings question in the rulemaking; and

(c) if the OTARD rule does not effect a taking, then under the Commission's own reasoning the rule is illogical and unnecessary, and therefore arbitrary, capricious, and an abuse of discretion.

The Orders seek to justify the extension of antenna placement for reception and transmission of fixed wireless services on three grounds:

- Elsewhere in the same Telecommunications Act of 1996 containing Section 207 is evidence that Congress intended "to promote telecommunications competition and the deployment of advanced telecommunications capability." (¶97)

- To fail to extend the authorization beyond video service would be irrational because "precisely the same antennas may be used for video services, telecommunications, and internet access." (¶98)

- The action to extend is "reasonably ancillary to several explicit statutory provisions." (¶101)

Yes, Congress was deliberately engaged in amending the Communications Act to promote competition and encourage the deployment of advanced telecommunications capabilities. But that makes the Commission all the more obliged to heed what Congress did not do. The amendments broadly affected, among others, Title II, Common Carriers; Title III, Provisions Relating to Radio; and Title VI, Cable Communications. Yet the instruction Congress gave the FCC in Section 207 of the 1996 Act was quite circumscribed.

The Commission was to act pursuant to Section 303. The agency was ordered – under its existing authority -- to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services."[21] The services were confined to "television

[21] Note, 47 U.S.C. §303, P.L. 104-104, Section 207; Orders, note 241.

broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."

That these restrictions might lead to irrational results for multi-purpose antennas, as the FCC claims, does not permit the agency to write new law.[22] For that matter, it is hardly rational to bias placement of fixed wireless service antennas toward tenant premises when a safer, less aesthetically displeasing solution is available through market negotiation for rooftop access. (Real Access Alliance Reply Comments, 51)

There is no mention of fixed wireless signals. Typically, and certainly in the case of the proponents here, such signals are delivered by common carriers. Congress acted to promote competition among telecommunications common carriers through substantial amendment of Title II. It acted to ensure prompt and fair competitive entry for personal wireless service providers by amending Section 332 of Title III. The 1996 Act, however, did not expressly seek to promote competition or advance the deployment of fixed wireless services.

Surely this was not for want of scope in the 1996 legislation. Congress could have dealt with fixed wireless service competition. It even included, as personal wireless services, "common carrier" wireless exchange access services. 47 U.S.C. §332(c)(7)(C). But the subsection did not speak to fixed wireless service at all. The Orders therefore concluded that Section 332(c)(7) "does not apply to customer-end antennas" of the type allowed on leased property.

The difference in the Commission's approach is striking – and inconsistent. On the one hand, the law is read closely to discern whether these personal radio transceivers constitute

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[22] *American Telephone and Telegraph Company v. F.C.C.*, 487 F.2d 865, 872 (2d Cir. 1973) (Rather than purporting to transfer its legislative power to the unbounded discretion of the regulatory body, Congress "intended a specific statutory basis for the Commission's authority.")

"personal wireless facilities." Having decided in the negative, the Commission stops there. (Orders, ¶¶99, 101) On the other hand, the Commission freely breaches Section 207's limitation to receive-only video programming services. Citing "ancillary" authority, the agency chooses to allow tenants, over the objection of a landlord, not only to receive but also to transmit fixed wireless signals.

The Commission finds its warrant in Section 303(r), a general empowerment to make rules. But the regulations must be "not inconsistent with law." Section 303(r) cannot function as a short circuit to whatever broad policy objectives the Commission perceives as included under Sections 1 or 2 of the Act. The substance of Titles II and III must be heeded or else there is nothing left for Congress to do and the Commission usurps the national legislature. In any event, as concerns building owners, "the Commission has no ancillary jurisdiction where it has no jurisdiction under Section 2(a)." (Real Access Alliance Reply Comments, 35)

The Orders (¶¶103-105) cite Sections 1, 4(i) 7, 201(b), 202(a), 205(a) and 303(r) as possible sources of ancillary authority. Read together, Sections 1 and 2 are general statements of the Commission's jurisdiction which include only persons "engaged in communication by wire or radio." MTE owners are not so engaged, by any stretch of the imagination. Simply owning private property which contains wires or other apparatus used for communications does not equate to engaging in communication by wire or radio.

Section 7 is a policy statement that establishes burdens of proof and timetables for the adjudication of disputes or the approval of applications concerning new technologies and services. It is not an independent source of authority.

Sections 4(i) and 303(r) do not confer ancillary authority. Section 4(i) is a "necessary and proper clause" empowering the Commission to deal with the unforeseen "to the extent necessary to regulate effectively those matters *already within the boundaries*."[23] Sections 4(i) and 303(r) are intended to fill in regulatory gaps, not confer jurisdiction. In each of the "ancillary authority" cases for which these provisions were cited by commenters favoring mandatory access, the Commission was simply filling in the blanks and exercising authority over entities it was already empowered to regulate.[24]

Sections 201(b), 202(a) and 205(a) concern charges, practices and classifications by common carriers. Reference to them is based on the sheer speculation that if antennas for video signals are regulated differently than antennas for fixed wireless service, consumers will be harmed. There is simply no warrant for the assumption that "consumers who want only fixed wireless service may inexorably be forced to pay unjust and unreasonable charges in connection with unwanted video programming."[25]

Even if the Commission were to determine that it can exercise ancillary authority over building owners, there are limits on the extent of that authority. In the oft-cited *Southwestern Cable* decision, the Supreme Court was careful to limit regulation of the new medium of cable television to "that reasonably ancillary to the effective performance of the Commission's various

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[23] *North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985). (emphasis added)

[24] *E.g., GTE Corp. v. F.C.C.*, 474 F.2d 724 (2d Cir. 1973) (Authority over common carriers sufficient to reach their data-processing activities); *National Broadcasting Company v. U.S.*, 319 U.S. 190 (1943); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966).

[25] Orders, ¶104. The Commission's attempt to turn speculation into reality is suggested by the peculiar juxtaposition of "inexorably may." The agency never considers the possibility that a landlord, forced to accept a video-only receiver, would be disinclined to anger a tenant by refusing to allow its use for fixed wireless service.

responsibilities for the regulation of television broadcasting," and to find that such limited regulation was "imperative for the achievement of [the] agency's ultimate purposes."[26] On this record (Section I, *supra*), the proponents have not come close to demonstrating that mandatory access to MTEs is imperative for the achievement of the FCC's purposes.

When the question was extension of FCC jurisdiction over the carrier-like operations of a cable system, a federal appellate court answered in the negative because the regulation appeared to have nothing to do with protection of TV broadcasting.[27] Nor does the Commission's power to regulate communications extend to real property issues, including contractual issues between owners and carriers.[28] It does not matter if the property is used in a regulated activity—the authority extends only to the activity itself, not the property where the activity is taking place.[29]

In the half-page string citation at note 261 of the Orders, the Commission goes to great length to justify regulating "in the absence of explicit regulatory authority." The note leads with the Supreme Court's decision in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), which in fact places the following limit on agency rulemaking under Section 201(b) of the Communications Act:

> The Commission could not, for example, regulate any aspect of intrastate communication not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.

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[26] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968). *See also, F.C.C. v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("Without reference to the provisions of the Act governing broadcasting, the Commission's jurisdiction under §2(a) would be unbounded.")

[27] *National Assn.of Reg. Util. Com'rs v. F.C.C.*, 533 F.2d 601, 615-17 (D.C. Cir. 1976).

[28] *See, Regents v. Carroll*, 338 U.S. 586 (1950).

[29] *Regents, supra; Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Illinois Citizens Committee for Broadcasting v. F.C.C.*, 467 F.2d 1397 (7th Cir. 1972); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

525 U.S. at 381, n.8. But that is precisely what the FCC has done in ordering building owners to allow tenant placement of small antennas. It has regulated building owners because of the asserted "ancillary effect" that disallowing such antennas would have on telecommunications competition.

Similar caveats in other note 261 cases appear to have been ignored. In *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988), the Court cautioned:

> Had the Commission proposed the Universal Service Fund for the purpose of subsidizing the incomes of impoverished telephone users, it would have exceeded its authority under section 154(i), as the provision of public welfare is not among its functions.

838 F.2d at 1315. Neither is landlord-tenant relations among the FCC's functions. The cited *North American Telecommunications Association* case warned, 737 F.2d at 1292, that "Section 4(i) is not infinitely elastic." And the *GTE Service Corporation* case, of course, barred the FCC from regulating the computer industry.

In short, the string of citations on ancillary jurisdiction is a thread that will not bear the weight the Orders attach to it.

III. THE ORDERS IMPROPERLY EXTEND THE REACH OF SECTION 224.

In Comments (48-57 and Exhibit F) and Reply Comments (23-28), the Real Access Alliance demonstrated that Section 224's references to ducts, conduits and rights-of-way cannot be understood to apply inside MTEs. The occupancy permits most often granted utilities consist of leases, licenses and easements -- distinctive features of property law varying from state to state. The Alliance also pointed out that the ducts, conduits or other physical paths typically are "neither owned nor controlled by the utilities that have the right to occupy them." (Comments, 49) Thus, the FCC's assumption that it could force third-party access upon utilities without disturbing owners' property rights is simply wrong.

The Alliance discussed at length why such forced third-party access would constitute a "taking" under the Fifth Amendment to the Constitution, a step that Congress has not authorized or provided just compensation for. (Comments, 55-57, and Exhibit E; Reply Comments, 35-50)

These points notwithstanding, the Commission reached the following conclusions:

1. "We conclude that the obligations of utilities under Section 224 encompass in-building facilities, such as riser conduits, that are owned or controlled by a utility." (¶80)

2. "We conclude that [the] legislative history does not circumscribe our authority to apply Section 224 to in-building ducts, conduits, or rights-of-way. The text of the statute, as well as the legislative history relating to its amendment in 1996, in no way limits the terms duct or conduit to underground facilities. . . . [T]he statute is unambiguous on its face." (¶81)

3. "We also conclude that "rights-of-way" in buildings means, at a minimum, defined pathways that are being used or have been specifically identified for use as part of a utility's transmission and distribution network." (¶82)

The Orders' conclusions are fundamentally erroneous because Congress did not intend for Section 224 to apply to facilities or access rights of any kind inside buildings; and because the term "rights-of-way" is a term of art in the law of real property that does not include pathways used by a utility inside a building.

The Orders responded to the Alliance's earlier arguments as follows:

1. "We therefore conclude that the nature of a right of access, and not the nomenclature applied, governs for these purposes." (¶82)

2. "We emphasize that the right of access granted under Section 224 lies only against utilities, and that Section 224 is not intended to override whatever authority or control MTE owners may otherwise retain under state law." (¶87)[30]

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[30] The Orders (note 228) gratuitously qualify this acknowledgment of state authority in property law by observing that "Massachusetts recently promulgated building access regulations which include a premises owner within the definition of "utility." The Building Owners and Managers Association in that state has challenged the regulations on definitional and other grounds. Greater Boston Real Estate Board, et al. v. Massachusetts Department of Telecommunications and Energy, filed November 3, 2000.

3. "Because we interpret Section 224 to apply only against utilities, there is no taking from premises owners. The only taking under Section 224 is from utilities, who are deprived of the power to exclude others from conduits or rights-of-way to the extent of their ownership or control. This taking, however, is compensated under statute and our rules, and thus is fully consistent with constitutional requirements."(¶89)[31]

None of these responses is even remotely satisfactory. Indeed, the Orders are internally inconsistent. Paragraph 81 asserts that the statute is unambiguous on its face, yet in paragraph 82 the Commission goes on to define the term "rights-of-way" in a way that is simply contrary to any accepted understanding of the term. The fact is that, paragraph 82 notwithstanding, the Commission's authority is circumscribed by the plain meaning of the term "rights-of-way." Because it is a term of art, the Commission cannot redefine it, but must give the term its ordinary meaning.

In its first response to our arguments, the Orders attempt to duck the issue by assuming that the "nature" of a utility's use is dispositive, but that begs the question. Congress used the term "rights-of-way" for a reason, and the Commission must defer to that decision. Consequently, the first question to be answered is "What is a right-of-way?" Rather than acknowledging that the phrase is a term of art and attempting to establish its meaning, the Commission contents itself by saying the phrase can have "a variety of meanings." But if a right-of-way means something that does not extend inside a building, then the "nature" of any use inside a building precludes that use from being called a "right-of-way." The Orders never acknowledge this central point.

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[31] The Orders assert (note 230) that this claim of constitutional consistency is founded on *Gulf Power I,* 187 F.3d 1324 (11th Cir. 1999) That is not correct. The Court did not reach the issue of whether the formula in the Commission's rules represents just compensation under the regime of mandatory access embodied in new Section 224(f). The Court framed the issue thus: Whether Limiting the FCC to Awarding a "Just and Reasonable" Rate Makes the Act's Process for Awarding Just Compensation Constitutionally Inadequate? The Court answered: "As an initial matter, we do not believe this matter is ripe for decision."187 F.3d at 1338.

In fact, the term right-of-way has two simple meanings: it can refer to either the unimpeded right to pass over another's land, or the strip of land used to exercise the right.[32] This right has never been understood to apply to a right to enter a building. Indeed, the Commission cites no authority whatsoever for that proposition. It is true that a right-of-way can take the form of an easement, but that does not mean that all easements are rights-of-way, nor does it mean that an easement that extends inside a building is a right-of-way. In fact, because of the degree of control exercised by a property owner, it is simply impossible for a building access right, however denominated, to be a right-of-way. The right to enter a building is always subject to interference: a building owner may close and lock the building; may limit after-hours entry to its employees or tenants; may limit entry by service personnel to certain hours or conditions, such as by requiring that they be escorted; and so on. Because there is no right of unimpeded access inside a building, there is no right of passage that conforms to the definition of a "right-of-way." Furthermore, there can be no physical strip of property associated with a right of passage that does not exist.

The Orders also assume that the "nature" of a use will be clearly recognizable in all cases. That expectation is unrealistic:

> For example, a utility could obtain a right to construct and maintain its distribution system across a parcel of land pursuant to an easement, lease, real property license or even by acquiring the fee interest in the land. To an outside observer each of these situations might appear identical. However, the rights possessed by the utility in each of these situations would be quite different.[33]

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[32] *See* Reilly, The Language of Real Estate (2d ed. 1982) at 418; *Kalinowski v. Jacobowski*, 100 P. 852 (Wash. 1909) ("right-of-way" is the right "to travel over a particular tract of land without interference"); 65 Am. Jur. 2d, Railroads § 50.

[33] Real Access Alliance Comments, Exhibit F, 22.

As noted above, Congress chose the term "rights-of-way," not "easement," "license" or "lease," and that nomenclature cannot be so easily dismissed. The term "right-of-way" was used to define "pole attachment" in the original version of Section 224, which became law in 1978. The same term was used by Congress in 1996 when it added subsection (f) guaranteeing access to poles by cable television systems and telecommunications carriers.

It is well settled that terms and phrases appearing in separate parts of a statute should be construed in the same way, if possible.[34] Thus we may look to see what Congress intended by its use of the right-of-way language in 1978 and assume the same intent in 1996 – absent legislative evidence to the contrary.

"This expansion of FCC regulatory authority," Congress said in 1977, reporting on S.1547 which included a new Section 224,

> is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems.[35]

In further explanation, the Senate report continued:

> Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws.

S.Rept. 95-580 at 124 (emphasis again added).

With the addition of Section 224(f) in 1996, Congress decided to require what the cable industry 18 years earlier had said was not needed – a guarantee of access to utility poles, ducts, conduits and rights-of-way. *Id.* But this new guarantee was never meant to run beyond the

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[34] *Barnson v. U.S.*, 816 F.2d 549, 554 (10th Cir. 1987), citing *United States v. Morton,* 467 U.S. 822, 828 (1984).

[35] S.Rept 95-580, 2 USCCAN 109, 123 (1978), emphasis added.

outdoor utility poles with aerial attachments or the outdoor ducts and conduits underground, or the rights-of-way associated with these poles, ducts or conduits. There simply is no evidence that Congress – when it guaranteed access – was also rewriting the 1978 phrase "pole, duct, conduit, or right-of-way owned or controlled by a utility" which it had used to define "pole attachment."

Congress had three principal purposes in mind in the 1996 amendments to Section 224. The first was the access guarantee of subsection (f). The second was extending to "providers of telecommunications service" the protected attachment rights already granted cable operators. The third was the adjustment of the rates formula, and associated notice obligations, to account more fairly for multiple attachers. Nowhere in the legislative record of the 1996 amendments does Congress indicate an intent to change the meaning of right-of-way as originally enacted.

The closest Congress came to the subject between 1978 and 1996 was the adoption of Section 621(a)(2) of the Communications Act in 1984, reading in part:

> Any [cable] franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which [are] within the area to be served by the cable system and which have been dedicated for compatible uses . . .[36]

There, the rights-of-way were plainly limited to public ways and the "dedicated" easements have been held to refer only to those involving "appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted by or on behalf of the public."[37]

On the basis of the foregoing, there is every reason to believe that the phrase "right-of-way owned or controlled by a utility" retains today the meaning intended by Congress in 1978.

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[36] Cable Communications Policy Act, P.L. 98-549, codified at 47 U.S.C. §541(a)(2). It is worth noting that Congress distinguished easements from rights-of-way, contrary to the Orders' equating of the two terms. (¶82)

[37] *Media General Cable v. Sequoyah Condominium Council,* 991 F.2d 1169, 1173 (4th Cir. 1993), citing Black's Law Dictionary, 6th edition.

As we have seen from the report on S.1547, that intent was "strictly circumscribed" to "arrangements affecting the provision of utility pole communications space" and to passage of "utility poles and wires" over private property. Thus, Congress had in mind the conventional local cable TV distribution facilities of the time, attached overhead to poles or buried underground in ducts or conduits. Only the rights-of-way associated with those aerial or underground traverses are included in Section 224.[38]

Furthermore, the Commission's own restrictions illustrate the futility of trying to apply the term rights-of-way inside buildings. Essentially, the Orders state that a right-of-way is not a right-of-way unless the utility can voluntarily provide access and obtain compensation for doing so. (Orders, ¶ 87) How common are such arrangements? The answer is, not at all -- so even if the Commission's interpretation were correct, in practice there would be very few rights-of-way inside buildings. Conversely, if there are unlikely to be rights-of-way inside buildings under the Commission's definition, then this strengthens the agreement that Congress did not mean to include building access rights within the scope of Section 224. Although not dispositive, it is highly unlikely that Congress would have used the term to mean something that is not only contrary to its usual meaning, but hardly ever happens. The fact is that the Orders do little more than to create the appearance of having granted certain parties a benefit of dubious legality and doubtful utility.

The Orders' second and third responses, quoted on page 17-18 above and relating to state property law and to the constitutional law of takings, assert that the FCC's actions are directed only at utilities and not at building owners. Thus, according to the agency, they do not affect any

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[38] This is borne out by the comments and conclusions in the proceeding to implement the new rate provisions of Section 224, Report and Order, CS Docket 97-151, 13 FCC Rcd 6777, 6831-32 (1998).("[T]here have been few instances of attachment to a right-of-way that did not include attachment to a pole, duct or conduit.")

owner's rights under state law. Moreover, any taking from a utility is justly compensated by the Section 224 formula. (Orders, ¶¶87, 89)

But any piggybacking by a CLEC on a utility's intra-building facilities or easements still infringes the owner's right to exclude. The Commission recognized this a scant four years ago in discussing unbundled access pursuant to Section 251(c)(3) of the Communications Act:

> We emphasize that access to inside wiring through the incumbent LEC's NID [network interface device] does not entitle a competitor to deliver its loop facilities into a building without the permission of the building owner. Similarly, access to an incumbent LEC's NID does not entitle the competitor to the riser and lateral cables between the NID and the individual units within the building, which may be owned or controlled, for example, by the premises owner.[39]

The same 1996 order's analysis of "Access to Rights of Way" (¶¶1119-1240) is wholly devoted to the purpose of pole attachments or their underground counterparts in localized communications distribution – cables housed in ducts or conduits. One searches in vain for any reference to rooftops or in-building risers.

Thus the 1996 amendment of Section 224 did not change the original, pole line-determined meaning of right-of-way. The Commission's early discussion of the amendment made no attempt to change the 1978 intent. What has changed, in the past four years, is the FCC's felt need to remedy perceived discrimination against telecommunications carriers seeking access to MTEs. But Section 224, as written, cannot be used for this purpose. Only Congress can change the law.

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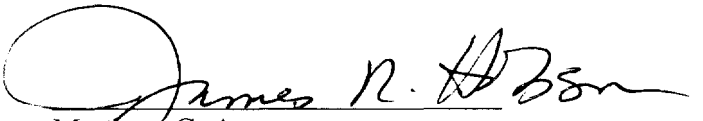
[39] Local Competition First Report and Order, 11 FCC Rcd 15499, 15697, n. 853.

CONCLUSION

For the reasons discussed, the Commission should reconsider its enlargement of Section 207, its misinterpretation of Section 224, and its statements regarding the market power of building owners. These proceedings, as advertised in the original Notice, should be terminated.

Respectfully submitted.



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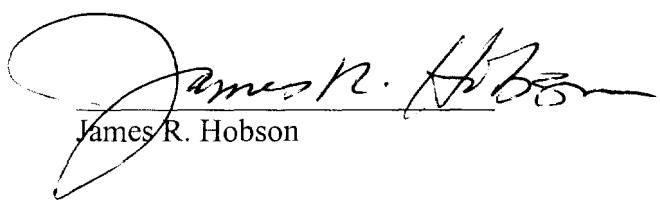

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